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No. 141

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE CONFEDERATED BANDS OF UTE INDIANS,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Claims (R. 24–38) are reported at 64 F. Supp. 569.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on March 4, 1946 (R. 38). The petition for a writ of certiorari was filed on June 3, 1946. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. 288 (b).

QUESTIONS PRESENTED

1. Whether the Executive Order of November 22, 1875, withdrawing public land for the use of the several bands of Ute Indians, vested petitioners with a title in the land which requires the United States to pay compensation for the restoration of such land to the public domain by the Executive Order of August 4, 1882.

2. If not, whether the United States, by the Act of June 15, 1880, agreed to compensate the petitioners for such land notwithstanding the fact that they had no compensable interest in such land.

STATUTES, TREATIES, AGREEMENTS AND EXECUTIVE ORDERS INVOLVED

Articles II and III of the Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 765, 990, provides as follows:

> ARTICLE II. The United States agree that the following district of country, to wit: commencing at that point on the southern boundary line of the Territory of Colorado where the meridian of longitude 107° west from Greenwich crosses the same; running thence north with said meridian to a point fifteen miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary-line of said Territory; thence south with said western boundary-line of said Territory to the southern boundar-

line of said Territory; thence east with said southern boundary-line to the place of beginning, shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

ARTICLE III. It is further agreed by the Indians, parties hereto, that henceforth they will and do hereby relinquish all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article.

The Executive Order of November 22, 1875, 1 Kappler 834, reads as follows:

EXECUTIVE MANSION,
November 22, 1875.

It is hereby ordered that the tract of country in the Territory of Colorado lying within the following-described boundaries,

viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of beginning, be, and the same hereby is, withdrawn from sale and set apart for the use of the several tribes of Ute Indians, as an addition to the present reservation in said Territory.

Section 3 of the Act of June 15, 1880, 21 Stat. 199, 203, 204, 1 Kappler 180, 185, provides as follows:

> SEC. 3. That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, under the direction of said commissioners, a sufficient quantity of land in the vicinities named in said agreement, to secure the settlement in severalty of said Indians as therein provided. And upon the completion of said survey and enumeration herein required, the said commissioners shall cause allotments of lands to be made to each and all of the said Indians, in quantity and character as set forth in the agreement above mentioned,

and whenever the report and proceedings of said commissioners, as required by this act, are approved by the President of the United States, he shall cause patents to issue to each and every allottee for the lands so allotted, with the same conditions, restrictions, and limitations mentioned therein as are provided in said agreement; and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided,* That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the Government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this

agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act: *Provided further,* That the subdivisions upon which are located improvements to be appraised, as provided for in section two of this act, shall be offered to the highest bidder at public sale, after published notice of at least thirty days by the Secretary of the Interior, and the same shall be absolutely reserved from occupation or claim until so sold.

The Executive Order of August 4, 1882, 1 Kappler 834, 835, provides as follows:

EXECUTIVE MANSION, *August 4, 1882.*

It is hereby ordered that the following-described tract of country in Colorado, viz: Commencing at the northeast corner of the present Ute Indian Reservation, as defined in the treaty of March 2, 1868 (Stats. at Large, vol. 15, p. 619); thence running north on the 107th degree of longitude to the first standard parallel north; thence west on said first standard parallel to the boundary line between Colorado and Utah; thence south with said boundary to the northwest corner of the Ute Indian Reservation; thence east with the north boundary of the said reservation to the place of be-

ginning, withdrawn from sale and set apart for the use of the several tribes of the Ute Indians by Executive order dated November 22, 1875, be, and the same hereby is, restored to the public domain.

STATEMENT

By treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 765, the United States established a reservation of about 15 million acres for petitioners.[1] The reservation was particularly described in Article II of the treaty (pp. 2–3, *supra*) as an area of land bounded on the east by the meridian of the 107th degree of west longitude; on the north by a line 15 miles north of the 40th parallel of north latitude; on the west by the western boundary of Colorado, and on the south by the southern boundary of Colorado. By Article III of the treaty the petitioners relinquished "all claims and rights in and to any portion of the United States or Territories, except such as are embraced in the limits defined in the preceding article." (Fdg. 3, R. 12).

Within the reservation so bounded the Government, pursuant to Article IV of the 1868 treaty, established the White River Agency at latitude 40°6′ north and longitude 107°40′ west (Fdg. 5,

[1] By agreement of September 13, 1873, ratified by the Act of April 29, 1874, petitioners ceded to the United States over 3 million acres of the land in the reservation thus established (Fdg. 4, R. 12).

R. 13). Survey of the northern boundary of the reservation was not made prior to 1875 (Fdg. 7, R. 16), and, between the time the reservation was established and that date, some difficulty resulted by reason of the fact that petitioners mistakenly thought the reservation so established extended farther north than was actually provided for in the treaty, even to the extent of making claim to lands in Wyoming (Fdg. 6, R. 13–16). In October or November, 1875, a survey of the north boundary was completed by one J. W. Miller. Miller ran the line west from a "certain corner," as instructed, but he knew that a line so run was not the correct boundary as provided in the treaty and that the line he did run was 15 to 18 miles south of the true north boundary. As a result of this error, the White River Agency was about ⅛ of a mile north of the erroneous line thus surveyed, and the White River Valley, while within the area actually covered by the treaty description, was likewise north of the Miller line (Fdg. 7, R. 16–18). In this situation the Secretary of the Interior, at the request of the Commissioner of Indian Affairs, requested the President to issue an executive order withdrawing "all that tract of country lying between the north boundary of the Ute Reservation, as defined in treaty of March 2, 1868, and the 1st standard parallel, north; and setting apart the same, as an addition to the present Ute Indian reservation in the

Territory of Colorado." Such order was issued on November 22, 1875 (pp. 3–4, *supra*). Fdgs. 8, 9, 10, R. 19–20.) While this order was regarded by the Commissioner of Indian Affairs as fully protecting "their improvements in the White River Valley and the Agency buildings," (Fdg. 11, R. 20), it will be observed that the order embraced an area wholly north of the true treaty boundary and thus north of the White River Valley and Agency, the exclusion of which by the erroneous Miller line led to issuance of the order.

By an agreement between the United States and petitioners, dated March 6, 1880, amended and ratified by the Act of June 15, 1880, 21 Stat. 199, 1 Kappler 180, the petitioners sold their reservation to the United States, excepting only certain lands for allotment to individual members. Section 3 of the Act (pp. 4–5, *supra*), after providing for allotments in severalty, directed that "* * * all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States * * *." The act proceeds to specify that the land be subject to cash entry and that the proceeds after certain deductions be deposited to the credit of the Indians. (Fdg. 12, R. 20, 21.)

Merely to remove doubts entertained by settlers as to their right to make entry and obtain patents, Congress by the Act of July 28, 1882, c. 357, 22 Stat. 178, 1 Kappler 205, declared the lands formerly occupied by the Uncompahgre and White River Utes to be public lands subject to disposal in accordance with section 3 of the 1880 Act, and on August 4, 1882, the President issued an executive order restoring to the public domain the land set aside for the use of the petitioners by the Executive Order of November 22, 1875. (Fdgs. 13, 14 and 15, R. 22, 23.)

Following the Act of 1880, the United States proceeded to sell the lands added to the treaty reservation by executive order in 1875 and restored to the public domain by executive order in 1882, as above outlined, as well as lands formerly in the treaty reservation. No accounting having been made to petitioners for lands so sold and other ceded lands reserved by the United States for public purposes, Congress by Act of March 3, 1909, c. 263, 35 Stat. 781, 788, 789, conferred power on the Court of Claims to hear, determine, and render final judgment on the "claims and rights" of petitioners under the agreement ratified by the 1880 Act, "including the value of all lands ceded by the said Indians (petitioners) which have been set apart and reserved from the public lands as public reservations * * *." Pursuant to such act petitioners brought suit in

the Court of Claims seeking recovery for the failure of the United States to dispose of the lands ceded by the agreement of 1880, for an accounting for lands sold, and for compensation for the lands reserved by the United States for public purposes, and petitioners recovered a judgment for the proceeds of cash sales of land, plus the value of lands reserved for public purposes. *The Ute Indians* v. *United States*, 45 C. Cls. 440, 46 C. Cls. 225 (1910). None of the lands so compensated for lay north of the true boundary of the reservation as fixed by the 1868 treaty (Fdgs. 16, 17, R. 23, 24).

By Act of June 28, 1938, 52 Stat. 1209, as amended by the Act of July 15, 1941, 55 Stat. 593 (R. 5–10) Congress conferred jurisdiction on the Court of Claims to "hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constitutent (sic) band thereof, may have against the United States * * *." By section 6 of said act of the Court of Claims was authorized to give judgment in favor of petitioners if the court finds that any lands formerly belonging to petitioners have been taken by the United States without compensation therefor. Pursuant to this act petitioners instituted the present action in the court below to recover for an alleged taking by the United States of that area north of the treaty reservation added to the reservation by Executive

Order in 1875 and restored to the public domain in 1882. After considering the evidence introduced, the court below found the facts as above outlined, concluded that petitioners were not entitled to recover, and entered judgment dismissing their petition. On June 3, 1946, petitioners filed their petition in this Court for a writ of certiorari to review the judgment.

ARGUMENT

1. The court below correctly decided that petitioners acquired no compensable interest or title in the lands in suit by reason of their being added to the treaty reservation by the Executive Order of November 22, 1875. This Court squarely held in *Sioux Tribe* v. *United States*, 316 U. S. 317, relied upon by the court below, that an executive order is ineffective to confer a compensable interest in Government-owned land, in the absence of authorization from Congress empowering the President to convey such an interest.

Petitioners (Pet. 13–15) seek to distinguish the decision in the *Sioux* case on the ground that in that case this Court dealt with executive order additions to a treaty reservation which additions were made solely to combat liquor traffic with the Sioux Indians. This is not factually correct. While the liquor problem was a major factor in creating the executive order additions to the treaty reservation, it was not the sole objective. As to

the Standing Rock addition, "a further reason for said request" [by the Commissioner for the creation of the addition] was that "the Agency buildings, as now located at Standing Rock, are outside the reservation as defined by [the Fort Laramie] treaty * * * but are included in the tract proposed to be withdrawn," 316 U. S. at p. 320. An identical situation prevailed in the case at bar; but the case here is stronger, in that the White River Agency was actually within the true treaty reservation and was merely thought to be without it by reason of an erroneous running of the north line of the reservation.

Moreover, this Court's decision in the *Sioux* case demonstrates the invalidity of petitioners' attempted distinction. The basis of that decision is that the power to convey a compensable interest in Government-owned land is vested by the Constitution in Congress alone, and in determining that no such interest is acquired in executive order reservations this Court relied upon the steady and uniform view of Congress and the Executive that "the Indians were not entitled to compensation upon the abolition of an executive order reservation," 316 U. S. at p. 330. This view was ascertained by a consideration of executive and congressional treatment of such executive order reservations generally, without regard to the purposes of their creation, particularly during the period from 1872 to 1886.

2. Petitioners ultimately bottom their claim on the only ground upon which it could possibly be supported, and that is that Congress agreed to compensate them for these lands by the 1880 Act ratifying the agreement of 1880 (Pet, 14.) Petitioners cite no authority for their contention that it was the intent of the parties to the 1868 Treaty to include the lands in suit within the reservation. On the contrary, the record shows that the problem giving rise to creating the addition by executive order was the erroneous exclusion from the true treaty reservation of the White River Valley and Agency, both of which were actually within the reservation defined by the treaty. Moreover, as the court below observed (R. 27), the United States was not committed in the agreement itself to compensate the Indians for ceded lands sold. The Government's agreement in that regard was added by Congress in section 3 of the ratifying act of 1880. In thus undertaking to sell the ceded lands for the Indians' benefit, however, Congress expressly limited the Government's liability to lands to which it acquired title from the Indians by virtue of the agreement. Since the Indians had no title under the executive order, they had none when the agreement was executed, and the Government did not acquire its title to the executive order lands by reason of the agreement; it had never parted with the title to such lands.

Petitioners emphasize the expression "present reservation" in the 1880 agreement and in the preamble to the ratifying act, and argue that the Indians understood the executive order lands to be part of their then reservation (Pet. 6, 7, 10). But assuming that this view is accepted, it does not establish that Congress considered that petitioners had any title in the lands which the Government acquired by the cession, or intended to recognize an obligation with respect thereto. On the contrary, as this Court held in the *Sioux* case, Congress has consistently regarded executive order reservations as vesting no compensable title in the Indians and this was the view taken by the administrative officials in 1882 (cf. R. 28). Thus, petitioners' position that Congress intended to compensate them for lands to which they had no title flies in the face of the express limitations imposed by Congress in assuming liability.

Finally, a reading of the 1880 Act demonstrates that Congress was not granting special favors to the Utes, such as agreeing to pay them for a large area the title to which was already in the United States and title to which the Utes never had. Congress, on the contrary, was bent upon avenging the massacre in 1879 of Meeker, the Indian Agent at White River, and all male employees of the agency, as well as the murder of members of the military. H. Ex. Doc. No. 1, pt. 5,

46th Cong., 2d sess. (1879), pp. 16–19, 82–97. The initial business of the act concerns the apprehension of the guilty parties, and the temper of the Congress to the White River Utes is shown by the provision that their proportion of the money to come to the Indians should not be paid until the guilty ones were apprehended or believed by the President to be dead, and the further provision that their proportion of the money be charged with annuities to be paid to the heirs of the victims of the massacre. 21 Stat. 199. In the light of these circumstances, it is idle to suggest that Congress intended gratuitously to assume the burden petitioners contend for.

Petitioners invoke the doctrine that doubts must be resolved in favor of the Indians (Pet. 11, 12). That principle has no application here. No doubt exists here since the petitioners' claim is barred by the express language used by Congress in fixing the limits of its undertaking under the 1880 Act, which act is the only basis upon which liability could possibly be shown.

CONCLUSION

The questions presented were correctly decided by the court below and there is neither conflict of decision nor question of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

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JULY 1946.

U. S. GOVERNMENT PRINTING OFFICE 1946